

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: **Jeremy THALER et al.** GROUP: 1794  
APPLICATION: **10/705,657** EXAMINER: H. Pratt  
FILED: November 10, 2003 CONFIRMATION: 6140  
FOR: **PEANUT BUTTER WITH AN ORGANIC STABILIZER AND METHOD  
FOR MANUFACTURE THEREOF**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**PETITION TO THE COMMISSIONER**

The Applicants/Appellants in the above-identified respectfully request that the Commissioner intervene in this application and direct the Examiner to provide a timely and comprehensive examination the above-identified application.

Applicants/Appellants respectfully submit that the Examiner has introduced new (old) grounds for rejection into the instant Appeal by Examiner's Answer and a Supplemental submission dated March 25, 2009, and has done so without: (i) preparing a revised Examiner's Answer that incorporates "reworked" rejections; and (ii) providing Applicants/Appellants an opportunity to either elect to re-open prosecution or to proceed on appeal. As a result Applicants/Appellants are placed in the position of now re-arguing against previously withdrawn rejections during the appeal process. Applicants/Appellants respectfully contend that the Examiner's Answer and Supplemental communication are inconsistent with the non-final rejections of August 2008 that were appealed, and must either be dismissed by the Board of Appeals or withdrawn before submission to the Board.

Chronology

Applicants/Appellants initiated this appeal after prosecution extending over almost two years, and in response to a Final Office Action dated January 23, 2008. With the Notice of Appeal filed June 18, 2008, Applicants/Appellants requested a Pre-Appeal Conference.

The Notice of Panel Decision from Pre-Appeal Brief Review, dated July 31, 2008, indicated that the rejection had been withdrawn and that a new Office Action would be mailed.

In the Office Action of August 22, 2008, the Examiner asserted all new grounds for rejection, each relying upon an additional reference. Applicants/Appellants believed the rejection to, once again, be improper and decided to immediately proceed with the appeal previously started. The basis for the Appeal and the rejections appealed were set forth in detail in the Appeal Brief filed October 20, 2008 (corrected November 26, 2008).

The Examiner issued an Examiner's Answer on February 6, 2009 that, while acknowledging that Appellants had properly set forth the grounds for appeal (see Examiner's Answer p. 2, Sect. 6), set forth new grounds for rejection beginning at p. 3 of the Examiner's Answer that were nonetheless inconsistent with the rejections of the Office Action from August 2008.

Moreover, the inconsistency of the rejections was acknowledged by the Examiner in a supplemental communication dated March 25, 2009.

The undersigned attorney contacted the Examiner by telephone on April 2, 2009, and inquired as to the basis for the supplemental remarks sent by the Examiner and why a replacement Examiner's Answer and new grounds for rejection had not been prepared. The Examiner indicated that the supplemental information addressed the inconsistencies, and further maintained that no new grounds for rejection had been set forth.<sup>1</sup>

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<sup>1</sup> The undersigned attorney also notes that a telephone message was left for Supervisor Cano after hours on April 2<sup>nd</sup>, 2009 asking for a review of this matter, and that as of the time of filing of this petition Supervisor Cano had not replied to the request.

*Relief Requested*

Due to an unextendable deadline for the Reply Brief, Applicants/Appellants have concurrently submitted a Reply Brief in order to preserve the Appeal, and in the event this petition is not granted, fully intend to seek redress before the Board of Appeals if this matter is advanced to the Board. However, it is respectfully urged that this matter may be appropriately dealt with by the Commissioner or a Group Director.

Applicants/Appellants request that, in the event the rejections are to be revised as the Examiner has proposed by Examiner's Amendment and the Supplemental communication of March 25, 2009, such rejections be expressly set forth in a complete and thorough manner to which a reply can be reasonably and timely prepared. Moreover, Applicants/Appellants respectfully request that the Examiner be directed to refrain from merely setting forth rejections that were previously withdrawn in response to a Pre-Appeal Conference. Doing so without any indication of a basis for reinstating a previously withdrawn rejection appears to be, at least on its face, a misuse of the Examiner's authority and forces Applicants/Appellants to expend further time and money to argue against rejections that a panel of three examiners had previously withdrawn. And, Applicants/Appellants also request that they be further provided the opportunity to elect to re-open prosecution or to simply proceed to the Board of Appeals with the option of submitting a further Reply Brief with a full two month period for response. Should Applicants/Appellants elect, subsequent to this petition to re-open prosecution, they further request, or reserve the right to request, a refund of all fees paid for filing of the Notice of Appeal and the Appeal Brief.

In the event that contact with the undersigned representative of Applicants/Appellants is believed advantageous to the resolution of this petition, authorization is hereby provided to do so at 585-899-3970 x 104.

**PATENT APPLICATION NUMBER: 10/705,657**  
**CONFIRMATION NUMBER: 6140**  
**ATTORNEY DOCKET NUMBER: 1077 001 301 0202**

If additional fees are required as a result of this petition, including fees for extensions of time, authorization is hereby provided to charge such fees to USPTO Deposit Account No. 50-2737 for Basch & Nickerson LLP.

Respectfully submitted,

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